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Before The

COMMITTEE ON PUBLIC WORKS

# UNITED STATES SENATE

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EXECUTIVE SESSION

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AIR AND WATER POLLUTION

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FRIDAY, JUNE 18, 1971

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United States Senate,

Subcommittee on Air and Water  
Pollution of the Committee  
on Public Works,

Washington, D. C.

The subcommittee met at 10:20 a.m., pursuant to call, in room 4200, Senate Office Building, Senator Edmund S. Muskie (chairman of the subcommittee) presiding.

Present: Senators Randolph, Muskie, Eagleton, Bentsen, Cooper, Boggs, and Beall.

Also present: Barry Meyer, counsel; Leon G. Billings, professional staff member; and Thomas C. Jorling, minority counsel.

Senator Muskie. John, I don't know whether you were present last time when we discussed the question of the House attitude on legislation this year, but apparently the House is moving very slowly in that direction. I gather that the committee wants to first rather thoroughly review the present programs and their implementation before they move to new legislation. So they have done nothing at all up to this point.

1       Clearly there is no prospect of getting legislation before  
2 the end of this month. So I don't see any reason for us to rush  
3 through some of these concepts that we are trying to develop,  
4 simply to put the Senate on record as having produced a bill by  
5 the first of July if the House is not going to do likewise.

6       I think the House ought to initiate the resolution for con-  
7 tinuing authorizations since they are the lackadaisical ones,  
8 and apparently they are going to. But the issue is going to be  
9 whether or not it will be a six-months extension or a three-  
10 months extension.

11       I think the House will probably be pushing for six months,  
12 because I think they would like to avoid legislation this year.  
13 I think we ought to press for three months' extension in order  
14 to keep the heat on. We can get a bill out long before that  
15 three months is up.

16       So my attitude now is, we ought to approach our own bill  
17 without the pressure of a July 1 deadline so that we can really  
18 work it out until we are fully satisfied with it; and, secondly,  
19 that we ought to press for a three-month extension on the con-  
20 tinuing resolution. I wonder how the rest of you might react  
21 to that.

22       Senator Cooper. I think it is all right. Why do you  
23 think they don't want any legislation this year?

24       Senator Muskie. If I can speculate, I think it is for two  
25 reasons. I don't think the House committee fully understands

1 what we have done up to now in the way of legislation as this  
2 committee does. We have initiated all of it, and we pretty much  
3 shape most of it. I think they feel a little out of touch and  
4 want to get caught up. I think that is one of the reasons in  
5 their understanding of what we have done and how it is working.

6 Secondly, I think they have some resentment for the fact  
7 that we have been the initiators, so they want to put themselves  
8 in the position of initiating, and they cannot do that unless  
9 they have that fuller understanding. I think that is the basis.

10 They did not hold hearings at all last year. They did not  
11 hold a single hearing last year, either the oversight hearings  
12 or hearings on legislation, and we held hearings last year, so  
13 it is a little frustrating now. Apparently now they feel some  
14 pressure for moving but not enough to get anything done this  
15 year.

16 Senator Cooper. Perhaps we could have a little slower  
17 pace here. Maybe instead of three meetings a week, we could  
18 have just one or two so we can catch up ourselves.

19 Senator Muskie. This morning I would like to pick up  
20 those sections of the bill that we have not touched at all yet.  
21 We have gone through some of it now. Let us see how much more  
22 we can go through so we can get exposed to the whole bill and  
23 then come back and refine the other areas. Leon, where do we  
24 start?

1 Senator Muskie. May I say for the benefit of the new mem-  
2 bers, in the past this question of the extent to which Federal  
3 authority or even State authority under policy has the right to  
4 move into plants, have access to their records, monitor their  
5 performance and so on has been controversial, obviously. There  
6 has been a great sensitivity on the part of industry to open up  
7 this area.

8 I think in the Air Pollution Bill of last year, we moved  
9 through some of those old resistances and put in stronger pro-  
10 visions than we would have contemplated six years ago.

11 Senator Cooper. There are similar provisions in the Air  
12 Quality Bill.

13 Senator Muskie. So these provisions are similar to what  
14 we enacted into law with the bill last year.

15 Mr. Billings. Can I ask Tom Jorling to handle this.

16 Mr. Jorling. If we start with the Clean Air Amendments as  
17 a point of departure, the only change on paragraph 1, the  
18 administration shall require in the air pollution measure, it  
19 is a discretionary requirement. Beyond that, the language is  
20 identical.

21 Senator Muskie. I don't think the new members would have  
22 in mind what the new provisions are.

23 Mr. Jorling. The provision provides authority to the  
24 administrator to do several things. The first of those is to  
25 require the installation of monitoring equipment, processes,

1 and methods. It is not necessarily a device, a black box that  
2 you hook onto a smokestack. Sometimes it is a technical and  
3 calculated process. But it provided clear authority for the  
4 administrator to require any owner or operator of any effluent  
5 source to install these kinds of systems or devices at the  
6 owner-operator's expense and then to go beyond that and provide  
7 that the information emanating from these kinds of systems  
8 would be available to the administrator and to State officials  
9 and to the public except to the limit provided for proprietary  
10 information provided in Title 18 of the law.

11 The exception in the Air Act and the exception that was  
12 proposed here from the proprietary information is that  
13 effluent raw data that is coming out of pipes is not propri-  
14 etary information. That must be made public. Other informa-  
15 tion, records, reports, and so on retain the proprietary  
16 privileges under the provision.

17 The second authority that is granted to the administrator  
18 is the right of entry to any effluent source facility to  
19 examine the effluent source for consistency with the law and  
20 the monitoring requirements or to require sampling again at the  
21 owner's expense when there is any effluence or emission.

22 Then this goes on to provide, as I already mentioned, the  
23 qualification on what happens to this information once it is  
24 acquired by the administrator.

25 I should mention one other provision. Under the many

1 other provisions of Federal law, the only thing that had to  
2 happen before proprietary status was granted was an allegation  
3 of the owner of it of that information. The Air Bill and this  
4 bill proposes to require the possessor of such information to  
5 show satisfactorily to the administrator that such information  
6 is entitled to that protection rather than simply requiring the  
7 owner to hold it as proprietary information.

8 That puts some burden on the possessor of that information  
9 to show why a particular set of information is entitled to pro-  
10 prietary status with the exception of effluent data which is  
11 not under any circumstances considered proprietary.

12 Senator Cooper. Is this monitoring equipment now  
13 available?

14 Mr. Jorling. Yes. For most processors there are systems  
15 and technology permitting monitoring. I should add, however,  
16 that there are many discharges for which there is not existing  
17 monitoring systems or devices in the sense that they are  
18 actually applied.

19 This varies from State to State. In States like Cali-  
20 fornia, there discharge sources have monitoring systems applied  
21 to them. Some other States have not yet reached that level of  
22 sophistication in their control program, so it is not yet uni-  
23 versally applied, but the technology is available to know what  
24 is coming out of a particular stack.

25 There are some difficulties technologically when you get



1 down to lower ratios of material versus total discharge down to  
2 the parts per billion and that kind of level, but the evidence  
3 is that even in that area there is technology to have detection  
4 down to very low quantities of material.

5 Senator Bentsen. Your point about putting the burden on  
6 the owner to show that it is proprietary, is the final judgment  
7 made by the administrator?

8 Mr. Jorling. Yes.

9 Senator Bentsen. Is there any appeal from that?

10 Mr. Jorling. Not a specific appeal. I would expect if  
11 the contention were made by the possessors that the administra-  
12 tor's determination was invalid under the Administrative Pro-  
13 cedure Act test, he would have that choice.

14 Senator Cooper. Why the requirement that it shall be made  
15 public? What answer can be given? Why?

16 Mr. Jorling. The requirement that effluent information be  
17 made public ties in with the concept that is woven throughout  
18 the bill that the public should have the right to know this  
19 kind of information, but more specifically it relates to the  
20 citizen's suit provision, where a citizen would be granted the  
21 right to bring an action for violation of an administratively  
22 or statutorily set requirement.

23 The only way meaning is brought to that section is if the  
24 citizen has access to information generated as a result of this  
25 requirement. Basically it is a provision to allow the citizens

1 the tools to become private attorneys general, in effect,  
2 through the citizen's suit provision.

3 I think, secondly, it has a less tangible effect in a pub-  
4 lic relations sense so if corporations are required to make  
5 their effluent data available, then they are going to look very  
6 carefully at how much effluent is being discharged.

7 The administration on this point feels very strongly that  
8 effluent data should be required to be furnished from any par-  
9 ticular corporation by the chief officers of that corporation.  
10 Their feeling is that many corporate executives do not know the  
11 things that are coming out of their plants that are scattered  
12 all over the country, so this kind of provision will assist in  
13 making everybody aware of what is coming out of the plants so  
14 the public political process can be brought to bear on that  
15 question.

16 Senator Cooper. In all of these measures, I have always  
17 contended there should be a right of appeal. This idea of due  
18 process is inherent in our system. At some point we should  
19 make sure there is some right of appeal.

20 Mr. Jorling. We do have a general appeal provision from  
21 Federal determinations in Title 5, again a provision that is  
22 technical changes required by semantics of air and water pollu-  
23 tion, and it is taken from the Air Pollution Act.

24 Cross-referencing is provided for certain Federal deter-  
25 minations with the implicit provision then that those Federal

determinations which are not explicitly described in this section would be appealable through the General Administrative Procedure Act.

If it would be desired, I think we could cross-reference this particular determination of an administrator on proprietary information and we could bring this in. The provision is added to distinguish it from the Administrative Procedure Act for a couple of reasons. One is to provide a time certain when the action must be brought, and that is done for promulgation of standards and the like on the theory these things have effective dates and the appeal procedure should be tied to those effective dates to the extent possible.

Other provisions, like determination of proprietary information where timing is not such a critical element, would be left to the Administrative Procedure Act on when the action must be brought before the right lapses.

So I think the determination is one as to whether a determination of proprietary standard by the administrator should be appealed within 30 days, required to be filed within 30 days, or simply extended the Administration Procedure Act provision.

Barry hands me a note that raises a whole set of other questions that are implicit in here that you should be aware of. Reading this monitoring section, it provides that information should be made available. It is possible this information would be used in a criminal action against a discharger or

owner-operator of a discharge source, so it raises real questions about self-incrimination and Fifth Amendment questions. We struggled with this in the air and oil and pollution action and further sanctions and some further contingencies.

Senator Cooper. I just wanted to raise the question, that is all, to be sure it is considered.

Senator Muskie. Are there further questions about that section? If not, let us turn to the next one, Federal enforcement. Again I may say, for the newcomers, that most of the last seven or eight years, we have had an enforcement procedure that began with a conference, and this would now eliminate the conference procedure, which was long, drawn-out, time-consuming.

It has an interesting history, but I don't think it is necessary to go into it unless you want to. Its purpose originally was to create a forum which was something other than a judicial forum or something other than an enforcement atmosphere to bring the parties in interest together informally before the issues were taken to court. But it is still part of the enforcement procedure.

This would eliminate the conference, as we eliminated it last year in the Clean Air Act. With that, can we go on.

Mr. Billings. Tom, would you make the point on the first paragraph.

Mr. Jorling. In the enforcement provisions in the Clean

1 Air Act as they finally became law, before the administrator  
2 could initiate Federal enforcement action, he had to furnish  
3 notice to the State agency and to the alleged violator and  
4 then, upon notification, wait a period of time, which is 30  
5 days, before actually commencing either the issuance of an  
6 order, a civil order, or a petition in a Federal district  
7 court.

8 The provision here eliminated the waiting period. The  
9 staff, I guess, has rethought its position and felt it more  
10 proper to reinstate the notice provision. This was emphasized  
11 repeatedly with the State officials that we met with. They  
12 feel they should have an opportunity, after the Federal Govern-  
13 ment learns of a violation or a possible violation, to initiate  
14 the action before the Federal Government enters the scene. I  
15 think they have some good cause for feeling that way.

16 One of the difficulties has been the limitations on man-  
17 power, the limitations on resources, and some limitations on  
18 the States' ability to act at the agency level. Some of them  
19 are constrained by their own law to require their attorney gen-  
20 eral in a Federal system as well to bring any enforcement  
21 action in the area of water pollution.

22 They have had trouble getting the attorneys general to act  
23 sort of de novo, but it helps when the Federal Government  
24 identifies an action and then the attorneys are more inclined  
25 to act. They feel with the requirement of notice, they would

1 be assisted in bringing enforcement action through the State  
2 law rather than having the Federal Government to come in and  
3 having to substitute its enforcement authority.

4 The staff would now recommend that the provision governing  
5 the Federal entrance to the enforcement procedure be the same  
6 as in the air pollution law without change.

7 I might add that the theory for the change in enforcement  
8 from the conference is one that reflects the philosophy of the  
9 Act that rather than having sort of an ambiguous fact situation  
10 created where you had the need of developing a full record at  
11 the enforcement stage, the Act now requires the setting of  
12 enforceable requirements on each individual discharge source.

13 It has an effluent limitation placed on it or an effluent  
14 standard or some requirement over its effluent. That is the  
15 enforceable obligation rather than looking at the ambient  
16 quality and all of the people affecting that ambient quality,  
17 bringing them altogether and then pointing out who is culpable  
18 for any procedures. This sets a requirement and then uses the  
19 enforcement of that requirement as the basic control system.

20 Senator Boggs. You don't do away with the enforcement  
21 conference, do you?

22 Mr. Jorling. Except in one situation that appears begin-  
23 ning on page 27, dealing with international pollution.

24 Senator Boggs. Is there some part of the enforcement con-  
25 ference that would be desirable to keep in order to prevent a

1 multiplicity of suits?

2 Mr. Jorling. My own feeling is no; the multiplicity-of-  
3 suit provision would be easily accommodated by the standard  
4 rules of procedure of the Federal courts. If action was brought  
5 against the same violator, they would be able to consolidate  
6 those.

7 We have a limit on venue, that the action can be brought  
8 only where the parent corporate headquarters or the actual  
9 situs of the discharging plant is, so I think the standard rules  
10 on consolidation would apply to avoid that problem.

11 The administration has recommended the retention of a  
12 limited form of the conference procedure; they feel, for some  
13 informational purposes that it would still be valuable to  
14 retain it as an option. Because of the way we have these  
15 administrative procedures leading to enforceable requirement, I  
16 think any informational requirement develops at the limita-  
17 tions rather than at the time of enforcement, so I don't think  
18 it is necessary except in this case of international pollution;  
19 and I should point out the nature of this.

20 This operates only where a U. S. polluter is alleged to be  
21 causing health and welfare effects in a foreign nation, and the  
22 provision operates only if the foreign government grants simi-  
23 lar rights to the United States to bring some sort of enforce-  
24 able action against a polluter in another jurisdiction, another  
25 State.

1 Senator Muskie. Would you cover the several criminal  
2 provisions.

3 Mr. Jorling. Hal mentions two other provisions from the  
4 Air Pollution Act. In the Air Pollution Act, once the admin-  
5 istrator finds, on the basis of information available to him,  
6 that there is an alleged violation, he retains discretionary  
7 authority whether he abates.

8 The staff recommends changing that "may" to "shall" on the  
9 belief he still retains a large element of discretion in his  
10 determination of whether or not the information available to  
11 him indicates a violation, on the theory if he has information  
12 a person is in violation, then he should be under some duty to  
13 bring the action.

14 A second change, as Hal points out, is the limitation on  
15 time in the event the administrator chooses to use the issuance  
16 of an order as the enforcement vehicle; the Clean Air Act pro-  
17 vision provided an unspecified period of time in which the  
18 order would have to be complied with.

19 The provision of the staff recommendation limits that  
20 period of time after the order is issued requiring compliance  
21 to 10 days, providing consultation with the alleged violator  
22 and the administrator or his delegate within that 10-day period.  
23 That is another change from the Air Pollution Bill.

24 Senator Cooper. What would be required after 10 days?

25 Mr. Jorling. Compliance with the terms of the order.



1 Failure to comply would result in the administrator's bringing  
2 an action in the Federal court to mandate compliance.

3 Senator Cooper. As a practical matter, do you think that  
4 is possible in every case -- 10 days?

5 Mr. Jorling. I think the question is one of determining  
6 whether an effluent requirement which has been established at  
7 an earlier time through an administrative procedure establish-  
8 ing a schedule of compliance to achieve it and then a violation,  
9 whether 10 days is enough to remedy the situation is a good one.

10 I am not sure that there is a clear answer to whether a  
11 10-day period would be sufficient to allow everyone to raise  
12 some of the issues involved and have them considered.

13 Senator Bentsen. Let me understand the process by which  
14 this fellow has some time to understand he is in violation prior  
15 to the 10 days. Apparently you arrive at a standard for him on  
16 the emission of the effluent, so he is becoming knowledgeable  
17 of this fact before this violation charge is filed against him;  
18 is that correct?

19 Mr. Jorling. To go back to the point in time when he  
20 finds what his obligation is, either because of a State imple-  
21 mentation plan for those kinds of things for which that is the  
22 basic method, controlling method, or the standard or toxic  
23 source -- let us assume those are the two Federal requirements  
24 that can be imposed. He learns of that and there is an effec-  
25 tive date for any of these.

1 In the case of a State implementation plant, the require-  
2 ment is placed "two parts per million shall be reached, and you  
3 shall reduce your effluent to that level in three years." He  
4 has that knowledge of what is required of him. Then there are  
5 monitoring requirements that are placed upon him.

6 Some time after that date, he comes into violation. It is  
7 anticipated that because of the monitoring requirements and  
8 because of the precise nature of the effluent standards, the  
9 fact situation of whether he is or is not in violation should  
10 be pretty clear.

11 When the administrator learns of this because of the moni-  
12 toring data or because a citizen in a canoe went down the out-  
13 flow pipe and sampled it or whatever the mechanism of his  
14 learning the violation, then the administrator chooses one of  
15 two alternatives.

16 First of all, he must notify the State and the discharger.  
17 Then, after waiting the required number of days, he chooses  
18 whether to go directly to Federal court or to issue an order,  
19 again the division premised on the fact that some things may be  
20 so clear that direct access to the court is appropriate.

21 Others, where the monitoring data might be close, then you  
22 would issue an order allowing the person to consult with the  
23 administrator, and this 10-day period is provided for that con-  
24 sultation before the actual order went into effect. This way,  
25 you would have some ability of the administrator to issue an

1 order, learn the monitoring equipment had been faulty or there  
2 had been a remedy applied by the discharger in a 10-day period  
3 before you brought the full leverage of the enforcement pro-  
4 vision to bear. That is sort of a flow.

5 Senator Bentsen. Your rationale here is that this does  
6 not come to the fellow as a complete surprise and he just has  
7 10 days to correct the situation; he has a standard and effec-  
8 tive date to work toward this?

9 Mr. Jorling. The entire emphasis of the Act is to get  
10 enforceable requirements placed on people that they know of so  
11 that enforcement is a relative clear issue, like the speedometer  
12 on an automobile or a speed limit on the highway.

13 Senator Beall. Are we taking the States out of the  
14 enforcement business and putting it totally in the hands of the  
15 Federal Government, so wouldn't it be wise for the States to  
16 abandon their enforcement provisions altogether and the Federal  
17 sets up the means for enforcement?

18 Really the State does not have any thought. The veto  
19 power rests with the Federal Government, and the standards are  
20 all set by the Federal Government. Wouldn't a State be smart  
21 to say, "Okay, Federal Government, take over and we will just  
22 give you logistical support of whatever is required to imple-  
23 ment the law"?

24 Mr. Jorling. I think, Senator, you point out a real fear.  
25 The intention is not to substitute for State enforcement but

1 rather to provide a backup to it. The implementation plan  
2 requirements set forth earlier require the State to have  
3 enforcement authority basically the equivalent of this and that  
4 the only time the Federal Government acts then is the State's  
5 failing to exercise its own authority.

6 If the State is enforcing the provisions applicable in that  
7 State, then this particular provision should never be exercised  
8 by the Federal Government. That is the requirement that we  
9 mentioned before, or the trigger for this is, when the Federal  
10 Government independently finds out about a violation, it must  
11 still notify the State before it can enter the enforcement  
12 activity.

13 Senator Boggs. And give the State how much time to act?

14 Mr. Jorling. The staff proposal would restore the 30-day  
15 amendment of the clean air provision.

16 Senator Muskie. This goes back to the original philosophy  
17 of this committee in writing legislation. We have tried, in  
18 effect, to build on the Federal system, not for any particular  
19 philosophical reason but we think this pollution problem  
20 across the country is so massive that to try to centralize the  
21 implementation policy here in Washington would be impossible.

22 So we have tried to build in mechanisms that would give  
23 meaningful authority and responsibility to the States but with  
24 Federal backup to insure the national policy is not undermined  
25 because the States default on their responsibility.

1 I don't know of any other area of national policy-making  
2 where there has been such a persistent and consistent attempt to  
3 try to make the Federal system work in connection with national  
4 goals. It may be that at some point we will have to abandon  
5 that and centralize it all. The staff is saying here they are  
6 trying to maintain that underlying approach both with respect  
7 to setting policy and standards and with enforcement.

8 It is appropriate, every time we write a new law, to review  
9 and consider, and this is why we persist in this effort to give  
10 the State its role. We think if the States will respond -- if  
11 they will respond -- we feel we can come to grips with the  
12 problem more effectively and if we try to centralize everything  
13 in Washington.

14 Senator Beall. I think that is a desirable approach. I  
15 did not mean to indicate it would be desirable to have more  
16 Federal control. I was wondering if we were pushing the States  
17 over the brink so they would be less willing to cooperate  
18 since the veto power apparently rests with the Federal Govern-  
19 ment and any decision they made would not be binding on the  
20 polluter.

21 Senator Muskie. That has been a relevant question since  
22 the beginning. It is conceivable that the States would find  
23 their role as meaningless and we would prefer to have the Fed-  
24 eral Government take it over. I don't know any compromise  
25 between the two; either you give the States this authority and

1 require that the implementation plan requirement is to insure  
2 that the States do have a meaningful enforcement program before  
3 their implementation plan is approved. If they have a meaning-  
4 ful enforcement program, then the assumption is they will  
5 undertake to use it.

6 Senator Boggs. I think a lot rests with the insight and  
7 ability of the Federal administrator to work with the States on  
8 this business. They realize the importance of working with the  
9 States if you are going to get the job done. Obviously they  
10 don't have the staff or money or ability to do it here at the  
11 Federal level.

12 Senator Muskie. Let me give you a statistic, if we have  
13 it, and when we had the conference procedure, that was always  
14 handled by the Federal authority. Any enforcement procedure  
15 then began with a conference which was initiated by the Federal  
16 authority with State participation. How many conferences have  
17 we had?

18 Mr. Billings. Nearly 60 since 1967.

19 Senator Muskie. They are cumbersome, bringing in every-  
20 body and necessitating Federal direction and initiative. So  
21 the enforcement authority really has not been used as effec-  
22 tively as it should because it has all been centralized.

23 Mr. Billings. Of those nearly 60 -- and I can't remember  
24 whether it is 59 or 60 or 58 -- only one of those cases has  
25 ever gone to court. Four have gone to hearing, and none of

1 them have been resolved to this date. The one that did go to  
2 court is still not resolved in behalf of pollution control.  
3 There is still a pollution problem.

4 Senator Muskie. Really I think you ought to impose some  
5 of the enforcement burden upon the States if you are going to  
6 get it implemented.

7 Senator Beall. I think the States should have a good deal  
8 of burden. I was wondering if we were not taking away the  
9 decision-making power so that when they were enforcing they  
10 really felt they could not enforce with any authority because  
11 someone might think they would veto that they did.

12 Mr. Billings. In our trips around the States this week,  
13 there was the question of "How do you keep them operating effec-  
14 tive programs while having a Federal capability to act in the  
15 absence of an effective State program?"

16 The State programs probably break out about 20 excellent,  
17 10 are fair, and 20 are pretty poor. In the 20 poor cases,  
18 they have had seven or eight years to develop programs. They  
19 need the Federal capability to act in the absence of State  
20 action. At the same time, they need a way that the States with  
21 good personnel and good enforcement capabilities can act.

22 Surprisingly, even in those States with good programs,  
23 there were suggestions such as "Can you figure out a way to  
24 delegate the Federal enforcement to us? Because what you have  
25 written in your bill is better than what we have, and we would

1 like to be able to use it." We have not found a solution to  
2 that problem.

3 Mr. Jorling. One of the more interesting conceptual  
4 things that was raised -- I think in California and also in  
5 Texas -- if a State could be delegated these enforcement pro-  
6 visions, would it be able to bring the action in the Federal  
7 court and would the sanctions here apply to the action if  
8 brought by the State?

9 They feel the Federal sanctions or proposed sanctions are  
10 much better than the State sanctions. After the State sanc-  
11 tions are \$50, \$60, \$70 fines. They are not all matched to the  
12 degree of the problem. That is one of the questions they  
13 raised, and we will have to ask some people who are much better  
14 with Federal, State, and delegation authority ty pe of pro-  
15 visions on that question.

16 Another factor that became clear in a State like Cali-  
17 fornia, the States are much closer to the problem than the Fed-  
18 eral Government, even the regional offices. In Los Angeles  
19 alone, there are 30 full-time State pollution inspectors check-  
20 ing weekly on effluents under a California permit for determin-  
21 ing violation. The Federal Government in California has one  
22 and a half people in the bureaucratic measurement system  
23 assigned to the problem of what the people in California are  
24 doing.

25 The Federal Government will always be under the limitation



1 of not knowing anything near as much as the States do, so the  
2 States should be able to retain pretty firm control. This pro-  
3 vision, then, would be hopefully retained only when the States  
4 are fialing to act and allow at the same time opportunity for  
5 States that want to be aggressive to act.

6 Mr. Billings. One other thing we have asked the States to  
7 provide us is some recommended language on how delegation of  
8 authority should operate. Under several of these provisions,  
9 we have a requirement that the administrator delegate the  
10 authority if he finds a State has an adequate program. They  
11 are concerned about the caprice of the administrator, which  
12 appears to be pretty good reason at this point.

13 We have asked them to give us some language which they feel  
14 would protect them in causing the administrator to delegate if  
15 you could make the case that you have an adequate program. We  
16 should have that by the next executive session. We can go into  
17 keeping this Federal-State relationship together.

18 Senator Bentsen. Talking about the capriciousness or  
19 arbitrariness of any administrator is the reason I want to see  
20 the right of appeal preserved in this type of situation. I  
21 think that you make a very valid point about a lot of the  
22 States and local agencies because of political difficulties and  
23 proximity to industries, they will not do it by de novo action.  
24 I think we need the Federal overview on these things and work-  
25 ing out local compromises if and when necessary.

1        Senator Boggs. Mr. Chairman, Leon has been talking about  
2 his and Tom's visits around the States. What was the main  
3 thing you found was their main advice to give us?

4        Mr. Billings. After we got skinned alive in Texas --

5        Senator Muskie. First tell the members where you went.

6        Mr. Billings. We spent all day Monday in Austin and then  
7 San Francisco and all day Tuesday meeting with the California-  
8 Washington-New Mexico people. Then we flew to Boston on Wednes-  
9 day and spent all day yesterday meeting with Massachusetts,  
10 Vermont, New Hampshire, Rhode Island, Maine, and New York.

11       I suppose the single overriding concern of the States is  
12 that they get treated in a capricious manner by the Federal  
13 agency. They feel if they are going to have a role in this pro-  
14 gram, they don't feel they are being consulted on any real  
15 basis. There are these constantly changing requirements about  
16 which they get very unclear information, if any information at  
17 all.

18       I think we were asked two things: One, write into the law,  
19 whatever you do, you are not going to do anything more for at  
20 least five years; and, two, give the administrator a certain  
21 amount of time to issue regulations and say, "You can't change  
22 them for five years," so we can get around to doing the pro-  
23 gram.

24       These people have some extremely legitimate complaints,  
25 and they have some pretty petty complaints, but I think if this

1 law is a good example of Federal-State relationship in law, the  
2 implementation of it is not a good example of Federal-State  
3 relationship. It has been frustrated by the constant changes in  
4 personnel and constant transfers and reorganizations and so on.  
5 They just do not feel the sensitivity for their problem. They  
6 think it is a typical Federal-State argument.

7 Senator Randolph. In that connection, Leon, this may be  
8 the appropriate time during this deliberation, and I do want to  
9 bring it to our attention or perhaps others will want to, this  
10 may be also true of segments of industry as well as the States  
11 themselves. I say: It may.

12 All of us have had correspondence from the American Iron  
13 and Steel Institute. You may not have had the opportunity to  
14 check that correspondence which came to me as the committee  
15 chairman, with copies to all members, under date of June 16.  
16 It poses a rather, I think, serious problem for us. It, of  
17 course, is going back to the Corps of Engineers this time, mov-  
18 ing in connection with the Refuse Act of the 1890's.

19 If what the Iron and Steel Institute says, Mr. Chairman,  
20 about the costs which are placed upon them within just a few  
21 days' time, beginning on July first -- as I say, if these situ-  
22 ations are true, I really pause for a moment to indicate that  
23 we might be doing the right thing in asking that there be a  
24 delay so that we can study the situation.

25 Not only is the Corps involved but rather hurriedly, I

1 believe, the Environmental Council and the Environmental Pro-  
2 tection Agency themselves are involved.

3 Senator Cooper talked with me earlier about this problem.  
4 I have not had the time to talk with you, Senator Muskie, or  
5 anyone else.

6 Senator Cooper. That is the reason why I asked a while ago  
7 if monitoring equipment was available. I received this letter,  
8 and I assume every other member of the committee did. Frankly,  
9 I did not know anything about it until I received the letter.  
10 The Iron and Steel Institute has written a letter to the Chief  
11 of Engineers, talking about the deadline for filing on July 1,  
12 1971.

13 They first take the position that there is not even time  
14 enough to file the information that is required. They just  
15 received the printed forms a few days ago. Second, it would  
16 be impossible for them to install the necessary equipment by  
17 that time; and, third, they go into cost.

18 I think these are questions that would have to be looked  
19 into.

20 As I understand it from reading the letter, the Council  
21 laid down some guidelines and the Corps of Engineers tried to  
22 implement them. It also requires application of the Refuse  
23 Act. I assume, in the preparation of this bill, we will do  
24 something about the Refuse Act which has been enacted and  
25 refers only to physical objects in the stream in obstructing

1 navigation.

2 Senator Muskie. The Refuse Act was a navigation Act.

3 Senator Cooper. The authority under is a matter for  
4 interpretation. I think this matter should be discussed. If  
5 there is not enough time, in all fairness, they should be given  
6 time.

7 On these decisions, they raise objections, of course, by  
8 people who are very much interested in environmental problems.

9 Mr. Jorling. This particular activity under the Refuse  
10 Act, the permit is probably to buttress what Leon said. This  
11 is what was probably the straw that broke the camel's back in  
12 the States.

13 The Refuse Act was enacted in 1899, which states basically  
14 that all discharges in navigable waters are prohibited. It  
15 goes on a little later to say: except where the permit is  
16 issued by the Corps of Engineers.

17 For the first 70 years of its existence, no permits were  
18 ever issued. Following this history, there was a considerable  
19 amount of agitation, some motivated by the inadequacies of the  
20 1965 Federal Control Act. This was looked upon as a possible  
21 vehicle for that direct access.

22 The President then in December issued an Executive Order  
23 instructing the various agencies of Government to implement a  
24 program using the permit language of the 1899 Act. It was  
25 developed among the Environmental Council, the Environmental

1 Protection Agency, and the Corps of Engineers.

2 Senator Randolph. Was the Justice Department involved?

3 Mr. Jorling. Yes; they have issued final guidelines on  
4 the implementation of the Act, so they were involved.

5 The point that disturbed the States more than anything  
6 else was that they were not asked, consulted, or otherwise  
7 included in any discussions leading to the development of an  
8 application form which I have the copy of in my hand. This is  
9 the Corps of Engineers' application for a permit form that the  
10 steel industry letter refers to which requires its submission  
11 by July 1. This sets up a one-to-one relationship between the  
12 polluters and EPA on a set of parameters that are independently  
13 derived.

14 In the better States -- Texas, California, and this is  
15 Maine's -- they have ongoing for several years, under the 1965  
16 Act, permit programs in which they have established a contact  
17 with each of the polluters in their States, developed a set of  
18 information upon which they issued the permit and have actually  
19 issued the permit.

20 In California, they have each of their discharges under  
21 permit control. Texas has almost all. They are still in the  
22 process of issuing them.

23 The situation as it now prevails is that the State has a  
24 permit for these discharges, and the Federal Government is now  
25 coming in -- some of these States -- the Federal Government is

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coming in with a parallel permit which no one knows is going to  
create a different set of obligations for the industry or the  
same set.

The information coming in under the Federal application  
involved is less than adequate in everyone's opinion, so no one  
is quite sure what the outcome of the Refuse Act permit is going  
to be. The States have identified it as possibly becoming an  
exclusive Federal Water Quality Control program regardless of  
any amendments because it sets up a one-to-one relationship  
with industry.

Mr. Billings. The Refuse Act does not require a permit for  
a discharge which goes through a municipal sewer. Every indus-  
try which is discharging as a matter of course into a municipal  
waste treatment plant is exempt. Every industry that dis-  
charges directly into navigable waters is covered.

What does this mean? In the City of Los Angeles there are  
12,000 sources of discharge, and I think 1200 of them go directly  
and the rest go into the municipal system. Everyone has a  
permit. In May, the Water Quality Standards Program basically  
will utilize municipal waste treatment plants for compatible  
industrial waste, so they have been encouraging putting this  
thing together.

All that are put together are free of this burden. All of  
those that are not put together yet have got to go through this  
program.

1 Taking the next step, those that are going into the municipal  
2 system are under a specific guideline as to when they have to  
3 achieve secondary waste standards or higher standards. That  
4 is 1976. Those that are going directly are also under a 1976  
5 deadline, but they are not assured there is any relationship  
6 between that deadline and the deadline that will be imposed  
7 under this new program.

8 More importantly, what we are told by -- apparently the  
9 Regional Office people in New England have said anybody who is  
10 in compliance with your water compliance standards for imple-  
11 mentation will not have their requirements changed under this  
12 program.

13 No other region has been given this assurance by the Corps  
14 of Engineers. They have been told they would be met on a case-  
15 by-case basis without regard to the Water Quality Standards  
16 Program. That is basically where the thing stands.

17 Senator Randolph. As an aside, just quickly, I think Leon  
18 and Tom going into the field and into the States as they have is  
19 very constructive and I commend you for making the arrangements  
20 to have this done. I am sure they learned and make available to  
21 us now information that is helpful, and I suppose it worked both  
22 ways.

23 You were informed, too, out there of some of these problems  
24 that we don't always feel here on the Hill.

25 Mr. Jorling. One of the practical aspects of this permit



1 program, for instance, you take the State of Texas. This is an  
2 actual form. It has a certain amount of information requirements  
3 to be furnished by a particular discharge source, including  
4 actual documentation of the components of their discharge.

5 This has been filed by each industry in Texas and each dis-  
6 charge point.

7 The fatal defect that the States see in the Refuse Act  
8 program is that it does not provide the control over municipal  
9 programs that is provided in the State program. Then comes the  
10 Federal Government requiring a similar application with no  
11 symmetry between them. You cannot look at the State permit and  
12 tell what they furnished the Federal Government or vice versa.

13 The State of California people said, "When you finally com-  
14 plete your deliberations, provide that all of the documentation  
15 over the control of the discharge source be in one document so  
16 that everybody does not have these parallel and possibly con-  
17 flicting sets of information."

18 Senator Bentsen. Let me ask about the application forms  
19 that were sent out by the Corps of Engineers which were delayed  
20 for some time. The last I heard was the the Office of Budget  
21 and Management has not approved those forms. As I understand it,  
22 they have the final authority to come in and revise again.

23 Mr. Jorling. The only information I have to date is the  
24 first set of application blanks developed by the Corps had 52  
25 parameters in it, and the OMB said through the negotiations that

1 that was just an impossible task for anyone to comply with in  
2 the July 1st time frame, so they caused a sliding of 41 of those  
3 parameters, so the obligation now is to furnish 11 parameters of  
4 information by July 1st of all applicants and October 1st for  
5 the remainder.

6 The facts about what this means are still unclear. When  
7 the program was first developed, the estimate was there were  
8 40,000 discharges that would require the necessary permit. The  
9 official estimate is now over 60,000 and the unofficial estimate  
10 is upwards of 200,000, all again to be furnished to the Corps  
11 by July 1st, processed by the Corps and permits issued by January.

12 Senator Boggs. It is impossible to do it.

13 Senator Muskie. First, I think it is unfortunate that there  
14 has been such a precipitous use of the Refuse Act for the pur-  
15 pose of pollution control. It has been on the books since 1899,  
16 and as Senator Cooper reminded us, it was enacted for naviga-  
17 tional purposes to create authority in the Corps to eliminate  
18 obstructions to navigation.

19 The language is broad enough so that by interpretation it  
20 can be, I guess, and has been, applied to effluent discharges for  
21 purposes of pollution control. Unfortunately, I don't think  
22 there was enough thought given to how this meshed with the Water  
23 Quality Standard, what has been done to implement the Water Qual-  
24 ity Standards at the State level.

25 There are no standards in the Refuse Act relating to water

1 Quality or pollution. So what was unleashed here was a purely  
2 administrative program for the setting of standards upon which  
3 to base the issuance of permits.

4 We have been faced from the beginning of this year with the  
5 challenge, then, of conforming the as yet undefined permit pro-  
6 gram under the Refuse Act and the proposed Water Quality Standard,  
7 and what we propose to do to change that. It is a mess.

8 The permit program under it seems to be such a more direct  
9 way to get at pollution that the conservation groups, environ-  
10 mental groups, have just rallied around it and created a very  
11 difficult problem for everyone concerned as a result.

12 The Refuse Act authority was first used with respect to the  
13 mercury problem. I don't disagree with that too much, because  
14 that was an emergency and should be used. I think its further  
15 implementation and expansion might well have been watched a  
16 little more carefully, and it might have been helpful to us if  
17 the Administration worked with us to try to do that in order to  
18 make the two conform.

19 Now we are faced with a situation where it is going to be  
20 very difficult to resolve. There is a very serious political  
21 problem here. If we are put in the position or appear to be  
22 put in the position of diluting what has been put in motion  
23 under the Refuse Act, we are going to be subject to criticism,  
24 so it is very difficult.

25 Senator Cooper. We all got acquainted with the Refuse Act

1 a few months ago and it is about that long. Its history was  
2 concerned with navigation and dealing with physical objects  
3 either discharged or washed by rains or floods, washed into the  
4 streams.

5 The President issued an Executive Order calling for, I  
6 guess, the Council of Environmental Quality to issue some guide-  
7 lines, which they have done. I think it would be good if we  
8 would ask the Corps of Engineers and Mr. Train and Mr. Ruckelshaus  
9 to come here and discuss it with the Committee.

10 Senator Muskie. I think we ought to do it in a closed ses-  
11 sion.

12 Senator Cooper. As you say, I don't think there are any  
13 standards or guidelines. I guess the only method of enforcement  
14 would be permits.

15 Senator Muskie. We had them in the hearings on this ques-  
16 tion of the relationship. Frankly, the Administration has given  
17 us no guidance on how it would like to conform the permit pro-  
18 gram to the water quality program or the legislation which the  
19 Administration itself submitted for the revision of the Water  
20 Quality Act.

21 We have not surfaced this. I am not interested in it. But  
22 at the same time, we have to be careful that the Congress does  
23 not look like a polluting Congress while the Administration is  
24 the clean party. This is the box we have been put into, so I  
25 think maybe the approach ought to be to ask them to come in and

1 ask how they plan to respond to problems of this kind.

2 They may be getting this same kind of letter. Let's have  
3 them come in and let us know how they reacted. I am all for  
4 that. Why don't we ask the staff to set that up?

5 Senator Cooper. Next week.

6 Senator Muskie. We have three days of executive sessions  
7 scheduled for next week. We can use one of those sessions for  
8 that purpose.

9 It is clear the House is not going to move on legislation,  
10 certainly not in time for the Congress to enact new legislation  
11 by July 1, so I don't think we have to try to meet that deadline.  
12 and I think the House would initiate a continuing resolution.

13 Mr. Billings. I just checked, and apparently Mr. Whitten  
14 has marked up the Public Works Appropriation Bill. It does not  
15 include any money for the water pollution program. There will  
16 be no extension. They will fund salaries out of special  
17 language.

18 As things stand right now, unless something else is done,  
19 there will be no funds for research or for construction grants.  
20 We are going to have to look at the language. There will be no  
21 research or construction grants or any reflection of the new  
22 budget request in the Environmental Protection Agency legislation  
23 that comes over from the Appropriations Committee right now.

24 We had been told before they were going to ask for an ex-  
25 tension, but because Whitten ignored the program as far as

1 construction grants, they have decided not to ask for a tempor-  
2 ary extension.

3 Senator Muskie. Do you mean Blatnik and his Committee have  
4 decided not to take any action?

5 Mr. Billings. That is right.

6 Senator Muskie. Is it their purpose to let the program die  
7 as of July 1st?

8 Mr. Billings. Insofar as the grant programs and so on,  
9 apparently that would be the effect. That is my understanding  
10 from talking to the people on the House side just a few minutes  
11 ago.

12 Senator Boggs. Mr. Chairman, Mr. Whitten is on the appro-  
13 priations side and on the Agricultural Appropriations Subcom-  
14 mittee, and that is where this item is now.

15 I don't know what Blatnik and the authorizing committee  
16 plans to do, but the Appropriations Committee generally are fol-  
17 lowing a policy, regardless of what it is, if it is not authorized,  
18 leave it out.

19 We have done that numerous times on the subcommittees I am  
20 on. They may be authorized later on, but the policy is: if it  
21 is not authorized now, leave it out.

22 Senator Muskie. Should we initiate authorizing legislation?

23 Senator Boggs. I think an extension of some time. This  
24 Agricultural Appropriations Bill is supposed to pass the 25th.  
25 I am on that Subcommittee, and we have our markup set for

1 Thursday, the 24th.

2 I was prepared in my little part on that committee to see  
3 that something is in there, but I would not get to first base  
4 unless we had something authorized.

5 Senator Muskie. If there is no objection, let's direct the  
6 staff to put together some authorizing legislation for ~~the~~ a three-  
7 months extension.

8 Senator Randolph. I would remind you that we have a full  
9 Public Works Committee on Tuesday afternoon. I think not only  
10 in this field but in some other associated and related matters,  
11 we can well make this a matter of concern for discussion.

12 Senator Muskie. Let's take the initiative. If the House  
13 does not want to take the initiative, we will, and our rationale  
14 will be the House has not done anything about putting legisla-  
15 tion together.

16 Mr. Billings. We can put them into one package and maybe  
17 get a little political support for them.

18 Senator Muskie. I think we ought not to feel the pressure  
19 lifting from us to proceed. What I would like to do next week  
20 is finish going through the committee print so that we can then  
21 begin to focus upon the policy questions that are most important  
22 and get them resolved.

23 I would like to go through with the three executive sessions  
24 we have set for next week.

25 Senator Boggs. I think it is very important to get a month

1 or two continuance.

2 Senator Muskie. Let's get that done, then.

3 Thank you very much. I think it has been a useful morning.

4 (Whereupon, at 11:36 a.m. the subcommittee recessed, to  
5 reconvene at 10 a.m., Tuesday, June 22, 1971.)



